No. 237

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

ARMCO DRAINAGE & METAL PRODUCTS, INC.,
FABRICATING DIVISION,

Petitioner,

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1955

ARMCO DRAINAGE & METAL PRODUCTS, INC., FABRICATING DIVISION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Armco Drainage & Metal Products, Inc., Fabricating Division, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered on February 18, 1955, enforcing in part an order of the National Labor Relations Board dated August 13, 1953.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (hereinafter called the "Board") are reported at 106 NLRB 725. The opinion of the Court of Appeals is reported at 220 F.2d 573, and a copy thereof is appended hereto.

JURISDICTION

The decree of the Court of Appeals was entered on February 18, 1955. An order of the Court denying Petitioner's petition for rehearing was entered on April 20, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1), and Section 10(e) of the National Labor Relations Act, as amended (hereinafter called the "Act").

QUESTIONS PRESENTED

I.

The Union wrote to Petitioner on January 29, 1952, claiming to represent a majority of employees in a designated unit and seeking recognition as bargaining agent for those employees. The letter clearly stated that if Petitioner did not reply the Union would file a petition for certification with the National Labor Relations Board. A petition was filed on February 5, 1952. On February 26, 1952, a consent election agreement was signed by the parties. In late February a Union activate told the plant manager that 115 employees had paid union dues. On March 11, 1952, the Union again wrote to Petitioner asserting its majority claim and offering to show signed authorization cards. At that date its majority claim was patently false. Petitioner declined recognition asserting it preferred to await the results of the election scheduled for one week hence. On March 18, 1952, the employees rejected the Union as bargaining representative by secret ballot. At no time did Petitioner do anything to intimidate or coerce, or in any way interfere with its employees in the exercise of their right to select or reject a bargaining agent in a secret election. The question in these circumstances is whether the Court of Appeals erred in directing Petitioner to bargain with a minority union, when the Union's loss of majority cannot be attributed to employer

unfair labor practices, but rather to an uncoerced rejection of the Union by the employees in a secret Board-conducted election?

II.

Whether knowledge of a card majority, when confronted with a bargaining demand, precludes an employer from insisting on a Board election if he agrees to a consent election and takes no unlawful action designed to dissipate the Union's card majority?

III.

Whether the Court of Appeals erred in not remanding the case to the Board for its determination as to whether Petitioner's failure to immediately grant recognition to the claiming Union is, of itself, a violation of Section 8(a)(5) of the Act, since the Board has exclusive jurisdiction to determine whether unfair labor practices have been committed and whether a remedy is required to effectuate the policy of the Act, and, if required, the nature and extent of the remedy?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. Sec. 141 *et seq.*) are set forth in the appendix to this petition, *infra*, pp. 1a-4a.

STATEMENT OF THE CASE*

The material facts in this case as found by the Court below are as follows. On January 29, 1952, the Union wrote

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* The rules of the Court below permit the use of an appendix record on appeal. R. A. citations refer to original transcript pages in Respondent's appendix filed below. B. A. citations refer to actual page numbers of Board's appendix filed below.

to Petitioner claiming to represent a majority of employees in a designated unit, seeking recognition as the exclusive bargaining agent for those employees and requesting negotiations with Petitioner with respect to the terms and conditions of employment for the employees. The letter was neither preceded nor followed by telephone or other personal contact (R. A. 12-14b). It contained no offer to substantiate its majority claim either directly or through a neutral third party by means of a card check or otherwise (R. A. 13-14b). The letter did state clearly that the Union intended to file a petition for certification with the Board in the event Petitioner did not reply or grant recognition (G. C. Exh. 2, B. A. 416-17a).

During the brief interval between the receipt of the letter and February 5, Petitioner did not reply. On February 5, 1952, the Union did what it said it would do by filing a petition for certification (G. C. Exh. 1-A, B. A. 392a). Thereafter, counsel for Petitioner, the Board's Field Examiner, and, on February 26, 1952, the Union representative, handled the matter through to the consent election agreement executed on that date (G. C. Exh. 1-B, B. A. 394a).

Sometime in late February the new plant manager had a conversation with a Union activate and was advised that 115 employees had paid initiation fees (B. A. 271-272a). On March 11, 1952, the Union wrote to Petitioner protesting a letter that the plant manager had sent to the employees. This letter contained another majority claim and a request for a negotiation meeting which, in view of the election meeting scheduled the following week, the Union author did not expect (R. A. 13-14b). The majority claim was patently false at that date (B. A. 364-365a). Petitioner, by letter dated March 13, 1952 (G. C. Exh. 7, 425-426a) declined recognition pending the outcome of the election, and the Board did not find a law violation stemming from this letter.

From the time just shortly after the Union's January 29 letter was received, and particularly after the consent election agreement was signed, until its defeat in the March 18 election, the Union enjoyed and exercised complete campaign freedom. It had the entire plant as a forum for its electioneering, and it was so used at a not inconsiderable sacrifice of production and without Petitioner objection (R. A. 117b, 135b). It had the spacious property outside the plant even extending to the entrance to the property where literature was freely distributed (R. A. 13b, 58-59b). Plant manager Hutton told the foremen in group not to interfere with the campaign, and Petitioner's attorney had previously told the foremen essentially the same thing (B. A. 303a, 306-307a). Employees freely approached the foremen and even Hutton, the plant manager, discussing any and all subjects of interest to them, including the election and the merits and demerits of unionism generally. They were free to talk to each other and did so constantly (R. A. 117b, 123-124b, 135b). Union leaders made it clear that this activity was without fear of reprisal (R. A. 136b, 123-24b). Union handbills were brought into the plant (R. A. 44b, 59b, 132-33b). Union buttons (R. A. 45b, 59b) and ribbons (R. A. 45b) were worn openly during working hours. There was a good deal of discussion in the plant (R. A. 59b). Groups formed and argued (R. A. 50b), without restraint or interference by Petitioner (R. A. 60b). Production was seriously affected and at times came to a virtual standstill. A Union witness testified that "seventy-five per cent [of the employees] talked and twenty-five per cent worked" (R. A. 117b). Another Union witness did not think that much work was done (R. A. 135b).

This complete campaign freedom prompted the Court below to state (see Opinion *infra*, p. 20a):

> "In no labor case that has come before us does there seem to have been as much unrestrained talk on the

part of everyone, as well as absence of any fear of the consequences of expressing their opinion, on the part of the employees. . . . The plant seems to have been used by everyone—employees, supervisors and officials alike—as an election hall; and it is a most notable fact that in spite of all this discussion and argument, no employee ever felt that he was being discriminated against or that he would suffer any disadvantage or discrimination because of his views as to the union or his expression or argument as to those views; and no one ever did."

Following this period of complete campaign freedom the Union lost the March 18, 1952 consent election by a vote of 75 to 63 (G. C. Exh. 1-C, B. A. 397a). It thereupon initiated its search for a means of accomplishing that which it could not accomplish through the statutory secret ballot. On March 19, 1952, the Union wired the Board's Regional Director objecting to the election on grounds said to be contained in mailed charges (G. C. Exh. 1-D, B. A. 398a). A letter mailed to the Regional Director on March 21, 1952, pursuant to the telegram referred to two isolated events allegedly occurring on March 18, 1952, the date of the election (R. C. Exh. 2, R. A. 194b). The first charges filed on March 20, 1952, aside from applying the general terms of the statute and broadening the period of alleged violation from March 18 back to March 1, 1952, referred specifically only to the same two isolated events supposedly occurring on March 18 (G. C. Exh. 1-H, B. A. 399a). Neither of these two isolated events were ever substantiated as law violations.

The complaint issued by the General Counsel not only stated the charges but moved in retrospect through the months preceding the charged March period. It not only alleged a refusal to bargain in connection with the Union's March 11, 1952 letter, but it alleged a precharge refusal in connection with the Union letter dated January 2[illegible]

1952. The Trial Examiner (hence the Board) did not find a refusal to bargain in connection with the March 11 letter but did find a refusal in connection with the January 29 letter. The theory of the Board's Section 8(a)(5) refusal was stated by the Trial Examiner, in language adopted by the Board, at B. A. 328a as follows:

> "The violation of Section 8(a)(5) alleged in the complaint stems, according to the basic theory of [the] complaint, from the Company's failure to meet and negotiate with the Union as requested in the Union's letter of January 29, 1952. The Company in defense asserts that it had a good faith doubt of the Union's majority, and that it was entitled as a matter of law to have the Union's majority status tested in a secret ballot representation election rather than by what it characterizes as a form of 'Gallup' poll. With that the General Counsel takes issue. He points to *other* conduct, to be described below, in which the Company, directly and through its alleged agents, the Citizens Committee, engaged in the period between the bargaining demand and the election date, and which he claims was violative of Section 8(a)(1) and 8(a)(2). *That conduct,* he contends, refutes the Company's good faith assertion, impairs the March 13 [18] 1952 election results as a true reflection of the employees' uncoerced desires, and destroys whatever right to [the] Company might otherwise have had to insist as a predicate to a bargaining order that the Union first establish its majority status at a secret ballot election. *Resolution of the Section 8(a)(5) issue must thus await consideration of the other conduct alleged to have been violative of Section 8(a)(1) and (2), and it is to this that we now turn.* (Our emphasis.)

The Trial Examiner and the Board then proceeded to find that Petitioner had subsequent to its failure to recognize the union, coerced and intimidated its employees through threats, promises and interrogations so as to pre-

vent the expression of their true desires in the secret election. The Board then found, on the basis of this *other* conduct violative of Section 8(a)(1) and (2) of the Act, that Petitioner's failure to grant recognition to the Union was not based on good faith doubt but rather on a desire to gain time in which to dissipate the Union's card majority and was, on that basis, violative of Section 8(a)(5). The election was declared a nullity and the Union was granted the presumption of continued majority status, the election to the contrary notwithstanding.

On review the Court below reversed the Board's findings and conclusions with respect to intimidation and coercion as not supported by substantial evidence, or by any evidence at all. Thus the Court stated (see Opinion, *infra*, p. 20a):

> "Throughout the examination of the entire record we have been assiduous to discover promises, threats, intimidation, or coercion; and these, we have not found."

Again at *infra* p. 22a the Court stated:

> "If there were any evidence that the statements made by respondent's officials or supervisory employees expressly or implicitly coerced, intimidated, interfered with, threatened, or promised benefits to the employees, we would be bound to hold that such statements constituted unfair labor practices; *but there is no evidence to support such conclusions.*" (Our emphasis.)

Thus the Court below destroyed the entire basis of the Board's theory of a bad faith refusal. It denied enforcement of all of the Board's petition except that it enforced the Board's order directing Petitioner to bargain upon request with the Union.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

In so far as the decision below holds that an employer who gains knowledge that a claiming union has a card majority must immediately recognize and bargain with the union without more it is squarely in conflict with the decision of the Seventh Circuit Court of Appeals in *National Labor Relations Board* v. *Gottlieb,* 208 F. 2d 682 (1954).

In the *Gottlieb* case the union wrote the company claiming a card majority and requesting bargaining for the 6 employees in the tool room unit involved. Upon receipt of the union letter the employer immediately questioned each of the employees as to their union membership. He was advised that 5 of the 6 employees had signed authorization cards. Thus he had definite knowledge of a card majority. Shortly thereafter all the employees withdrew from the union. The Board found that the employees' withdrawal had been coerced by the employer's interrogation as to union membership and an alleged threat to close down the tool room. The Seventh Circuit held, on review, that the evidence was not sufficient to sustain the Board's finding that the employer had coerced his employees into withdrawing from the union. The Court also held, by implication, that since the union's loss of majority was not attributable to unfair labor practices on the part of the employer his refusal to bargain was not unlawful even though he knew the union had a card majority immediately after he received the request to bargain. In this connection the Court stated, *supra,* at p. 685:

> "Considering the record as a whole, it fails to reveal substantial evidence to show that the company committed unfair labor practices in violation of Sec. 8(a)(1). The Board's finding that the company refused to bargain in violation of Sec. 8(a)(5) was based in turn on its finding that the company had violated Sec. 8(a)(1). They fall together. As there is no basis in the record for the order of the Board, the enforcement of said order is denied."

The decision of the Seventh Circuit is compellingly significant in three important respects and is in direct conflict with the decision below on all three counts. First, the Seventh Circuit recognized and properly applied the Board's rule that mere knowledge of a card majority does not render unlawful *per se* an employer's refusal to immediately recognize and bargain with a claiming union.[1] Second, the Seventh Circuit recognized that the Board's refusal to bargain finding was predicated on its Section 8(a)(1) findings of coercion, and that without the 8(a)(1) element there was no 8(a)(5) violation. Third, the Seventh Circuit recognized that it did not have the power to dismiss the 8(a)(1) from that case and make an independent finding that the failure of the employer to immediately recognize the union standing alone was an unlawful refusal to bargain.

In so far as we have been able to determine the *Gottlieb* decision and the decision below are unique. They are the only two "refusal to bargain" cases in which the reviewing Courts of Appeals found that the Board's findings of unfair labor practices violative of Section 8(a)(1)(2)(3) or (4) of the Act were not substantiated by the evidence on the record considered as a whole. In both cases it was the Board's position that the employers' failure to reply to the unions'

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[1] *Leiter Manufacturing Co.*, 112 NLRB No. 114; *B. F. Goodrich Co.*, 106 NLRB 757; *Walmac Co.*, 106 NLRB 1355. (Discussed in detail, *poste.*)

bargaining requests was based, not on any bona fide doubt of the unions' majority claims, but rather on a rejection of the collective bargaining principle and a desire to gain time in which to dissipate the union's majority. Evidence of the employers' bad faith lay in their unfair practices violative of other sections of the Act. In both cases the reviewing Courts of Appeals found that the employer had not committed unfair labor practices violative of other sections of the Act. Here all similarity ends, with one Court holding that the mere failure to reply was an unlawful refusal to bargain, the other holding that it was not.

The decision in *Gottlieb* is entirely consistent with another Circuit Court decision almost directly in point. In *Mount Hope Finishing Co.* v. *NLRB*, 211 F. 2d 365 (C. A. 4), the Board had found the employer guilty of unlawfully refusing to bargain with a union that won a Board-directed election. In that case the employer refused to recognize the union, had insisted that the union be certified pursuant to a Board-directed election and shortly after the union won the election the employer closed down its Massachusetts plant, and moved its operations to North Carolina. On the basis of these facts the Board concluded that the employer had unlawfully refused to bargain in good faith from the date the union made its original demand. The Fourth Circuit on review found that the move to North Carolina was motivated by sound economic principles as was the layoff of some 65 employees before the election which the Board had found discriminatory. The Court then held that since the employed could lawfully insist on an election, and since the evidence did not sustain the finding of unfair labor practices that formed the basis of the Board's conclusion, that the employer's refusal to bargain was unlawful, the 8(a)(5) portion of the Board's order was without basis and was dismissed along with the rest of the order.

Actually, the decisions of the Seventh Circuit in *Gottlieb* and the Fourth Circuit in *Mount Hope Finishing Co.*, are consistent with every other Circuit Court of Appeals decision on this point where the reviewing court has *upheld* the Board's findings of unfair labor practices violative of other sections of the Act. The most frequently cited case on this point is *Joy Silk Mills* v. *NLRB,* 185 F. 2d 732, cert. denied 341 U. S. 914, wherein the Circuit Court of Appeals for the District of Columbia held, *supra,* at p. 741:

> "The question presented is then whether Gilbert's refusal to bargain *was permissible* under the Act. It has been held that an employer may refuse recognition to a union when motivated by a good faith doubt as to that union's majority status. *North Electric Mfg. Co.* v. *NLRB,* 6 Cir., 123 F. 2d 887; *NLRB* v. *Chicago Apparatus Co.,* 7 Cir., 116 F. 2d 753. When, however, such refusal is due to a desire to gain time *and to take action* to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a)(5) of the Act." (Emphasis ours.)

The Court then went on to hold that the Board's findings that the employer had interfered with the election were supported by the evidence and that the employer's coercive activities preceding the election were sufficient "... to permit the Board to conclude that its refusal to bargain was as ill-intentioned as its *other* actions." (Emphasis ours.)

In *NLRB* v. *Epstein,* 203 F. 2d 482, 484 (C. A. 3), a similar type case, the Court held:

> "Of course, an employer may rightfully withhold recognition from a union *possessed of majority status* and request an election to confirm its accreditation if there is a bona fide doubt of a majority. Where the refusal is merely to afford time *to take action* to dissipate the majority, it constitutes a violation of the duty

> to bargain set forth in Section 8(a)(5) of the Act." (Emphasis ours.)

In *NLRB* v. *Stewart*, 207 F. 2d 8 (C. A. 5), the Court stated:

> "It is well recognized that an employer may withhold recognition from a Union *representing a majority* of his employees only if the employer in good faith doubts the Union's claim." (Emphasis ours.)

In both the latter cases there was no question but what the unions involved represented a majority of employees. However, the employers' failure to recognize was not unlawful for that reason alone, but rather for the reason that the failure to recognize was designed to gain time in which to take other unlawful action to dissipate the union majority in each case. The unlawful acts of interference and coercion were clear evidence of the employers' lack of good faith in refusing to bargain. Absent the acts of interference and coercion the failure to recognize would not have been unlawful.

To the same effect are the following Circuit Court decisions: *NLRB* v. *Inter-City Advertising Co.*, 190 F. 2d 420 (C. A. 4); *NLRB* v. *Kobritz*, 193 F. 2d 8 (C. A. 1); *NLRB* v. *Ken Rose Motors*, 193 F. 2d 769 (C. A. 1); *NLRB* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C. A. 9) *NLRB* v. *W. T. Grant Co.*, 199 F. 2d 711 (C. A. 9); *NLRB* v. *Southeastern Rubber Mfg. Co.*, 213 F. 2d 11 (C. A. 5); *NLRB* v. *Stow Manufacturing Co.*, 217 F. 2d 900 (C. A. 2).

The foregoing cases make it clear that the rule governing this type of case is that an employer may refuse to bargain with a claiming union until it establishes its status in a Board-conducted election so long as he takes no independent unlawful action aimed at destroying the union's majority, and this is true whether or not the employer has knowledge

of a card majority. In stating that rule we want to make it clear that we are not contending that an employer has an absolute right to refuse to bargain until the union becomes certified. We recognize, as this Court recently stated in *Brooks* v. *NLRB,* 348 U. S. 96, that while Board certification can only be granted as a result of an election "... an employer would presumably still be under a duty to bargain with an uncertified union that had a clear majority. . . ." We also recognize that the duty to bargain may arise as of the time that a union with a clear majority makes its bargaining demand. However, we do contend that that theoretical duty to bargain is by Board practice held in abeyance during a representation proceeding and is only revived, or presumed to have been a continuing obligation, where the employer has committed unfair labor practices designed to defeat the purposes of the representation procedure and evidencing an unlawful rejection of the collective bargaining principle.

We can perhaps best illustrate the practical application of this principle by applying it to two distinct hypothetical fact situations. Assume in one case a bargaining demand by a union possessed of a majority which is refused by the employer who insists on an election. The parties agree to a consent election which the union loses. The essential ingredients are a demand, a refusal and a lost election. In the second case assume a demand, a refusal and a lost election, but add a series of employer unfair labor practices that contribute directly to the union's loss of majority. In the second case the essential ingredients are a demand, a refusal, employer unfair labor practices, and a lost election. In both cases there "presumably" was an obligation to bargain at the time the demand was made, but in the first case the Board would excuse an employer from his obligation, while in the second case it would not permit him to avoid his obligation where his obvious purpose was to

dissipate the union's majority or prevent a free choice in the subsequent election. The case at bar and the *Gottlieb* and *Mount Hope Finishing Co.* cases fall within the first type case, while *Joy Silk Mills* and *Kobritz* and kindred cases cited previously, fall within the second type of case.

Thus, when we say that the cases make it clear that an employer may refuse to bargain until the claiming union establishes its majority in a Board election, we are saying that the cases confirm the Board's exercise of its prerogative to excuse an employer's refusal to bargain on equity principles when the employer in refusing to bargain does nothing to dissipate the majority or prevent a free election. It is the exercise of this prerogative by refusing to revive a statutory obligation to bargain arising at the time of the demand after the union has lost an election, with which the employer has not interfered, that becomes the right of an employer to refuse to bargain when he is acting in good faith.

In failing to follow that rule the Court below brought itself in conflict with every Circuit Court decision on this point, in addition to bringing itself in conflict with the Seventh Circuit on the knowledge issue.

In so far as the decision below holds that an employer, when confronted with a surprise bargaining request, must immediately recognize and bargain with the claiming union without being entitled to wait until the union offers to demonstrate its claimed majority, it is in conflict with the following Circuit Court cases:

Mount Hope Finishing Co. v. *NLRB,* 211 F. 2d 365 (4th Cir. 1954); *Texarkana Bus Co.* v. *National Labor Relations Board,* 119 F. 2d 480 (8th Cir. 1941); *National Labor Relations Board* v. *Union Pacific Stages,* 99 F. 2d 153 (9th Cir. 1938).

The decision below is also in direct conflict on this point with *North Electric Mfg. Co.* v. *National Labor Relations*

Board, 123 F. 2d 887 (6th Cir. 1941), although the latter case does not appear to be expressly overruled by the decision below. This Court took cognizance of all but one of the cited cases, and the principle they establish in Mr. Justice Rutledge's dissenting opinion in *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 692 (1944).

The evidence in this case establishes beyond peradventure of a doubt that the Union's letter of January 29, 1952 came as a complete surprise to Petitioner. It was neither preceded or followed by personal contact either by union representatives or employees designated to speak for the Union. Employees who signed cards testified, without exception, that they had signed secretively and without Petitioner knowledge. After mailing its initial letter the Union made no effort to demonstrate or in any way substantiate its majority claim. It waited five working days after Petitioner had received the letter and then filed its petition for certification as it said it would. The Court below held that none of these considerations justified a failure to reply to the Union's letter or a failure to recognize and bargain with the Union, or "at least to inquire as to the proof of its designation as bargaining agent for the majority of employees." Thus, the Court below places squarely on the employer the burden of determining the accuracy of every Union claim of majority, and this in spite of the fact that the Act and Board decisions place severe restrictions on the right of employers to investigate union activity among their employees.

This Court, in *Virginia Railway Co.* v. *Federation,* 300 U. S. 515 (1937) held that the law "imposes the affirmative duty to treat only with the true representative and hence the negative duty to treat with no other." That holding, arising under the Railway Labor Act, was noticed and applied to the Act under consideration in *NLRB* v. *Jones*

& Laughlin Steel Corp., 301 U. S. 1, 44. Realizing that this language placed an employer at his peril in recognizing a bargaining representative, the Eighth Circuit Court of Appeals in *Texarkana Bus Co.* v. *NLRB, supra,* held that:

> ". . . common prudence dictates that he [employer] refrain from acting until satisfactory proof is produced that the representative in fact speaks for a majority of employees. . . . The employer cannot be required to devote his time to negotiating with every individual claiming to represent a bargaining unit, and cannot be charged with unfair practice in this regard unless there is presented to him evidence of a substantial character showing that the representative is in fact an authorized bargaining agency."

In *Mount Hope Finishing Co.* v. *NLRB, supra,* the Board had found an 8(a)(5) violation in the respondent's failure to immediately recognize and bargain with the union upon request. Instead respondent insisted that the union first become certified. In reversing that finding the Fifth Circuit said that the Board had not taken into account the union's failure to offer to show the company by membership cards or otherwise, that it represented a majority and that the union filed its petition for certification before it received the employer's refusal to bargain. The Court then went on to say, *supra,* at p. 373:

> "The case therefore falls within the rule that when an employer is faced with a demand for recognition of a union, he may withhold recognition until the union's claims are established."

In the case at bar the Union did not offer to demonstrate its card majority until its March 11 letter. By that date its majority claim was without foundation and the election was scheduled for one week hence.

THE DECISION OF THE COURT BELOW RAISES A QUESTION OF MAJOR IMPORTANCE IN THE ADMINISTRATION OF THE ACT.

In a recent decision, *Gilbert Co.*, 110 NLRB 231, the Board made the following statement:

> "The question of whether and in what circumstances the Board should, consonant with the statutory policy, issue a bargaining order in favor of a union on a showing of authorization cards, *is a recurring one of considerable importance in the administration of the statute.*" (Emphasis ours.)

Actually, this serious question is twofold in nature for it involves cases where the union has followed the Board's representation procedure through a secret election and lost, as well as cases like *Gilbert* where the petition was withdrawn and an 8(a)(5) charge filed before an election.

The problem with which we are directly concerned, one which this Court has never directly considered, arises when a union follows the representation procedure through a secret election and loses, and then seeks to establish its bargaining status on the basis of signed cards obtained weeks and sometimes months before the lost election. This problem has plagued the Board for years and its natural repugnance toward issuing a bargaining order in derrogation of its own secret election result has caused it to devise a series of rules over the years to govern the "lost-election" situation. The original post-1947 rule set forth in *Denton Sleeping Garment Mills, Inc.*, 93 NLRB 329 (1951), was to the effect that a union could not use, as a basis for setting aside an election, any unfair labor practices committed by an employer, with union knowledge, before the election. The union had to choose between proceeding with an election or withdrawing its petition and filing charges. If it chose the former it was deemed to have waived the unfair labor practices.

Shortly thereafter in *M. H. Davidson Company,* 94 NLRB 142 (1951), the majority of the Board (Member Murdock dissenting) modified that rule so as to permit a union to file an 8(a)(5) charge after losing an election. In that case it was the theory of the majority that if the employer's failure to recognize the union and insistence on an election was predicated solely on a desire to gain time in which to take unlawful action to dissipate the union's majority it was unlawful. It this manner unions were permitted "two bites of the apple"—they could follow the election procedure through to defeat and then seek bargaining status through Board direction.

Finally, in *Aiello Dairy Farms,* 110 NLRB No. 205 (1954), the Board (Member Peterson dissenting) reversed the *M. H. Davidson* case and established the current rule that a union that follows its certification procedure through an election with knowledge of employer unfair labor practices will not be permitted to ". . . revert to an 8(a)(5) proceeding based upon the same unfair labor practices as a means of establishing its representative status." Thus the wheel has turned full circle and the Board is back to the point where refusal to bargain cases fall within an absolute waiver rule.

We have detailed the Board's "waiver" rules in lost-election situations to demonstrate as forcefully as possible the reluctance of the Board to ignore the results of its own election procedure. To ignore a secret election result is not only dangerous, but is administratively unwise as the majority pointed out in the *Aiello* decision. However, the Board, in the *Davidson* case, did make a narrow exception to its "waiver" rule in cases where the employer used the time gained by his refusal to recognize to take serious and unlawful action to destroy the union's majority. That this was intended to be the only exception is clear, and yet the Court below, by holding that a mere failure to recognize

with knowledge of a card majority, but without unlawful action on the part of the employer, is of itself an unlawful refusal to bargain has introduced a new rule that is certain to add a new and distressing element of confusion in the administration of the Act, as it relates to the issuance of bargaining directives on the showing of authorization cards.

The soundness of the new rule from an administrative viewpoint becomes a question of critical importance as a result of the recently announced *Aiello* rule whereby a union must either go through with the election and be bound by the result or must withdraw its petition and file an 8(a)(5) charge. Recent Board decisions, to be discussed below, indicate that unions are withdrawing and filing charges. When this is done the Board is still confronted with the question of whether the employer's refusal to bargain is unlawful. In deciding this question the Board is still judging the legality or illegality of the refusal in the light of the employer's *other conduct*. This policy is clearly in conflict with the decision below, and, if that decision is permitted to stand employers will never know in any given situation whether their conduct is legal or illegal, or, whether it will be considered legal by the administrative agency charged with the responsibility of administering the Act and later held to be illegal by a reviewing court.

The conflict between the decision below and Board policy is pointed up sharply in *Gilbert Co.*, 110 NLRB No. 231. In that case the employer learned that 15 of his 27 employees had signed authorization cards before the union made its request for bargaining. The same day the employer interrogated his employees as to their union activity and announced a forthcoming wage increase. The next day a poll was conducted among the employees to determine whether they wanted union representation. At a meeting with union representatives a day or two later, the employer

refused recognition insisting that the union first prove its majority in a secret election. In the light of the employer's unfair practices the union refused to agree to an election and filed charges alleging among other things an unlawful refusal to bargain.

The Board found that the employer had violated Section 8(a)(1) by interrogating and polling the employees. It then passed to the consideration of the refusal to bargain charge with this preliminary statement:

> "Ordinarily when confronted with a union's claim that it represents a majority of employees in an appropriate unit together with a request for collective bargaining, *the employer may refuse to rely upon evidence of representation in the form of authorization cards signed by employees and insist that the union prove its majority in a secret election conducted under Board auspices.* However, the Board, with the approval of the courts, has made *an exception to this right* of an employer, where the refusal to recognize the union is motivated not by a good faith doubt of the union's majority, but, as stated in the *Joy Silk Mills* case, which is hereby reaffirmed, 'is due to a desire to gain time *and to take action* to dissipate the union's majority. . . .'" (Emphasis ours.)

The Board then went on to point out that the question of whether an employer is legitimately or illegitimately motivated in refusing recognition:

> ". . . depends in the final analysis, upon all the facts and circumstances of that case. There is no rule which will save the Board from the necessity of a discriminating analysis and appraisal of all the relevant evidence before making a good or bad faith determination. It is all the circumstances of the particular case, including the employer's background, the 'character or extent' of the unfair labor practices, and the sequence of events which must be considered before a good or bad faith determination can be made."

The Board then found that the employer's expressed willingness to have an election was an indicia of good faith as was the absence of unfair labor practices *after* the request for an election, and that the employer violations of Section 8(a)(1) were not sufficient to establish bad faith. The refusal to bargain therefore was not unlawful. Compare those facts with the instant case where Petitioner immediately agreed to a consent election and committed *no unfair labor practices* at any time. Clearly, under the Board's own rules, Petitioner's failure to recognize the Union was not unlawful. Of equal significance is the fact that the Board went into the good faith question at all, for, if the decision of the Court below were correct, and not in direct conflict with Board policy, all that would have been necessary would have been for the Board to determine, as it noted incidentally, that the employer knew that 15 of his 27 employees had joined the union. With such knowledge the failure to recognize would have been illegal *ipso facto*. That the Board consciously rejected such a proposition bespeaks clearly its administrative determination that such a rule is not consonant with statutory policy.

Another case to the same effect is *Leiter Mfg. Co.*, 112 NLRB No. 114, 36 LRRM 1123. There the union represented a majority, evidenced by signed authorization cards, at the time it requested bargaining. The employer refused to recognize the union on three separate occasions. Each time the refusal was based on his insistence that the union obtain Board certification. The Board held that the refusal to bargain was not unlawful pointing out first that an employer may withhold recognition from a union "having majority status" if he does so in good faith. The Board then stated:

> "Therefore, the fact that the employer had good reason to believe that a majority of the employees had

signed union cards did not preclude him from *lawfully* demanding an election as a prerequisite to recognition, so long as he did not do so for the purpose of delay *to gain time to dissipate this majority.*" (Emphasis ours.)

At the risk of belaboring this point unduly we also want to make it clear that the Board's policy rule that a failure to recognize is not unlawful in the absence of other conduct was in effect at the time of the decision below and for a considerable period of time prior thereto. A case directly in point and decided prior to the decision below is *B. F. Goodrich Co.*, 106 NLRB 757. The union had a card majority at the time it made its bargaining request. The signed cards were shown to a company official who copied down the names and compared them with the store payroll. In the face of this knowledge the employer refused recognition without an election. The union filed charges alleging that the employer had violated Section 8(a)(1) and (5) of the Act. The Board, after finding that the employer had not violated Section 8(a)(1) dismissed the complaint in its entirety, although it specifically found that the union represented "a majority of the employees in the appropriate unit at all times material herein," and that the employer specifically "refused to recognize the Union." See also *Walmac Co.*, 106 NLRB 1355, and *The Hartford Currant Company*, 64 NLRB 213, to the same effect.

In the Fourteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1949, the Board, in reviewing its decisions in this field stated, *supra*, p. 71:

> "Further, the Board has held that an employer acting *in good faith*, may with impunity challenge the union's majority claim and condition bargaining upon substantiation of the claim in a Board election, even though the demand for recognition is properly made." (Emphasis as in original.)

The rule has been restated in every subsequent Annual Report.

From the foregoing it is clear that the Board has always been troubled with devising a policy to govern the issuance of bargaining directives on the basis of signed authorization cards that will accord with statutory policy. To date the issuance of bargaining directives on the basis of cards has been administratively sanctioned in only one narrowly defined type of unfair labor practice case. The Board, charged with the initial responsibility for properly administering the Act, has never deviated from this single exception to its waiver rule; that is, that a failure to recognize is not unlawful unless the employer's other conduct demonstrates that the purpose of the employer is to gain time to take action to destroy the union's majority. The Court below has attempted to establish a new and arbitrary rule in the instant case. To sustain the new rule would be to add to the problems of the Board in its attempt to devise and apply in these cases, a sound policy consistent with statutory policy and the Congressional intent. It is also manifest that where two conflicting rules are intended to govern the same situation the result is bound to be confusion for employers who will be unable to determine a lawful course of action when confronted with a union claim of majority and a request for bargaining. If they petition for an election, as they have a statutory right to do, or if they insist that the union petition for an election, as they have a Board-sanctioned right to do, they may find that years later it will be decided that the mere insistence on an election is sufficient basis for an order directing them to bargain with a minority union. Such an order will be then, as it is now, contrary to statutory policy and repugnant to the basic concepts of industrial relations.

III.

THE COURT BELOW ERRED IN ENFORCING THE 8(a)(5) PORTION OF THE BOARD'S ORDER AFTER MAKING ITS OWN FINDINGS TO SUPPORT IT INSTEAD OF REMANDING IT TO THE BOARD FOR A DETERMINATION OF THE 8(a)(5) ISSUE IN THE LIGHT OF ITS OPINION.

The Board's theory of this case from the Trial Examiner's Intermediate Report through counsel's argument in the Court below, was that Petitioner's failure to answer the Union's letter of January 29, 1952 was an unlawful refusal to bargain *because* it was motivated not by a good faith doubt of the Union's majority status, but rather by a desire to gain time in which to take unlawful action to dissipate the claimed majority. Evidence of Petitioner's bad faith was found by the Board in the alleged unfair practices violative of Section 8(a)(1), 8(a)(2) and 8(a)(4) of the Act.

The Court below found, however, that there was not substantial evidence on the record, considered as a whole, to sustain the Board's unfair labor practice findings. In so doing the Court destroyed the entire basis of the Board's theory of a bad faith refusal. This required, if not a dismissal of the Board's petition in its entirety, at the very least, a remand to the Board for its determination as to whether Petitioner's refusal to bargain was unlawful in the absence of unfair labor practices. *Davis Furniture Co.* v. *NLRB*, 197 F. 2d 435 (C. A. 9), *Morand Bros. Beverage Co.* v. *NLRB*, 190 F. 2d 576 (C. A. 7); *NLRB* v. *Stowe Spinning Co.*, 336 U. S. 226; *NLRB* v. *Don Juan, Inc.*, 178 F. 2d 625; *International Brotherhood, etc.* v. *International Union, etc.*, 106 F. 2d 871 (C. A. 9); *Armour & Co.* v. *Alton P. Co.*, 312 U. S. 195; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Instead, the Court determined that Petitioner's failure to recognize the Union on January

30, 1952 was unlawful *ipso facto*. In so doing the Court exceeded its power of review and improperly invaded an area reserved exclusively for the Board by the Congress, for, as this Court said in *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 365:

> ". . . Sections 10(a) and (c) of the Act commits to the Board *the exclusive power* to decide *whether unfair labor practices have been committed* and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practices." (Emphasis ours.)

Furthermore, after finding that Petitioner's mere failure to recognize was in of itself unlawful, a finding the Board did not and would not make, the Court below fashioned a remedy for the bargaining transgression it had judicially found. We say the Court below made an independent finding of an unfair labor practice and fashioned its own remedy therefor because we think it clear that it cannot seriously be contended that in directing Petitioner to bargain the Court was simply enforcing the Board's remedy. This is made strikingly clear by a comparison of the reasons given for the remedy directed by the Board and the Court, respectively. Thus, the Trial Examiner in his Intermediate Report (B. A. 379a, adopted by the Board) states that:

> ". . . it must be presumed, and it is here found, that since the Union enjoyed a majority on January 30, 1952, when the bargaining request was received by the Company, any subsequent defection from the Union was attributable to the Company's *intervening unfair labor practices.*" (Emphasis ours.)

On the other hand, the Court below held that, ". . . An order which would fail to guarantee to the union restoration to the status which it would have enjoyed, except for an

employer's conduct in wrongfully refusing to bargain, would allow such party to profit by its own wrong." Thus, it is clear that the Board is saying that an order which failed to restore the union to the status it enjoyed before the employer destroyed its majority through the commission of unfair labor practices would allow Petitioner to profit by its own wrongdoing. It was that wrong that the Board's order sought to remedy. The Court after finding that Petitioner committed no intervening unfair labor practices, and thus establishing that Petitioner did not unlawfully dissipate the Union's majority, is saying that an order that failed to restore the Union to the status it enjoyed before Petitioner failed to recognize it, would permit Petitioner to benefit from a single act that *the Court* found to be unlawful. The remedy is admittedly the same but it is invoked by the Court on a totally different basis and to remedy a totally different act which the Court alone found to be unlawful.

Assuming for purposes of argument that Petitioner's failure to recognize, standing alone, was an avoidance of a statutorily implied obligation to bargain, it was not incumbent on the Court below to make that finding or to fashion the remedy. For all practical purposes the decision below is to the effect that the Board erred as a matter of law in not finding the failure to recognize, by itself, an unlawful refusal to bargain. When a reviewing court finds that the Board erred as a matter of law, the only power the Court has is to remand the case to the Board. The Court lacks any power to fashion a remedy. *American Newspaper Publishing Assn.* v. *NLRB*, 190 F. 2d 45 (C. A. 7).

This Court has consistently recognized and enforced that principle. In *International Association of Machinists, Tool and Die Makers Lodge No. 35* v. *NLRB*, 311 U. S. 72, it was held that:

> "... It is for the Board not the courts to determine how the effect of prior unfair labor practices may be expunged. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271, 82 L. Ed. 831, 837, 58 S. Ct. 571, 115 ALR 307; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461, 84 L. Ed. 396, 400, 60 S. Ct. 307."

The rule is equally applicable to the review of orders of other administrative agencies under comparable statutes. In *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.*, 328 U. S. 193, 203-4, this Court said:

> "... The fashioning of the remedy is a matter entrusted to the Commission which has wide latitude for judgment...."

In *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612, this Court said:

> "... The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed."

In that case this Court also stated, *supra*, at pgs. 611-612: "... Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited.", citing among other cases, *International Association M.T.D.M.L.* v. *NLRB*, 311 U. S. 72, *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177; *Virginia Electric Co.* v. *NLRB*, 319 U. S. 533; *Frank Bros. Co.* v. *NLRB*, 321 U. S. 702.

In the instant case the Board found that a series of unfair labor practices violative of Section 8(a)(1), 8(a)(2), and 8(a)(4) of the Act added up to a violation of Section 8(a)(5). The Court found that there were no 8(a)(1), 8(a)(2) or 8(a)(4) violations, but proceeded to find an 8(a)(5) violation. The Board finding was that the whole equalled the sum of the parts while the Court found the

whole without benefit of the parts. That is a geometric impossibility and a legal anomaly. In reaching its conclusion the Board relied on its "putative specialized experience in the field of labor relations: an experience that is thought to enable it to appraise causes and consequences that escape the perception of those less widely acquainted with those relations."[2] Congress assumed that courts lacked the same perception and therefore denied them the right to make original findings of unfair labor practices or to fashion remedies therefor. In the instant case the Court exceeded that Congressional mandate. Board expertise must be relied on in determining the cause and effect of employer's acts and since the Board's prerogative in this area is exclusive, the only proper course for the Court below was a remand to the Board with instructions to make specific findings and conclusions as to the legality or illegality of Petitioner's failure to recognize the Union in the light of the facts as found by the Court. Once that finding is made it will be for the Board to determine whether a remedy is necessary, and if so, the nature and extent of the remedy.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] *NLRB* v. *Stow Manufacturing Co.*, 217 F. 2d 900 (C. A. 2).

APPENDIX A

Statute

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. Sec. 141 *et seq.*) are as follows:

* * * * * *

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

* * * * * *

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

* * * * * *

"SEC. 8(a)(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

* * * * * *

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unior appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bar-

gaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

* * * * * *

"SEC. 9 (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

'(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

'(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

* * * * * *

"SEC. 10(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including

the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations,

if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

APPENDIX B

Opinion of the Court Below

Before ALLEN, MCALLISTER, and MILLER, Circuit Judges.

MCALLISTER, Circuit Judge. The National Labor Relations Board filed a petition for enforcement of its order requiring respondent to cease and desist from unfair labor practices in violation of Title 29 U. S. C. A., Section 158 (a)(1), (2), and (5), in interfering with and coercing its employees in the exercise of their rights of self-organization, and in refusing to bargain collectively with the representative of such employees, and further requiring respondent to post the appropriate and customary notices directed by the Board.

The controversy, as well as the inception of union organization among respondent's employees, began in 1951 when, under the law then prevailing, respondent was unable to increase wages without approval from the Wage Stabilization Board because of the fact that its plant had not been in operation on January 15, 1950, the so-called "base date" on which the Wage Stabilization Board's self-executing regulations were based. In order to increase wages, respondent, therefore, pursuant to the regulations, filed with that Board on September 4, 1951, a petition seeking permission to grant, effective as of that date, a ten-cent hourly increase to all of its employees, and an additional five-cent hourly increase to approximately one-sixth of its employees who were believed to be receiving a lower wage rate than other employees performing substantially the same work; and the petition set forth that the employees had no recognized or certified bargaining agent and that no representation petition was then pending. Proceedings dragged on, and although more than three months elapsed after respondent had petitioned for increased wages for its hourly manual workers, nothing was done. The workers, therefore,

not receiving the wages to which they were entitled, and which the respondent company wished to pay them, apparently became restive, and in December, 1951, one of the employees requested the UAW-CIO, hereinafter called the union, to organize the plant and assist the employees. After five months had passed with no sign of life on the part of the Wage Stabilization Board with respect to respondent's petition to increase the wages of its employees, the union, as of January 29, 1952, had obtained designation cards signed by 93 of the 144 employees of respondent company, forming a unit appropriate for collective bargaining purposes. By letter of that date, the union informed respondent of its majority status and requested respondent to meet and negotiate with it as the collective bargaining agent of respondent's employees. The letter asked for an immediate reply, and when, by February 5, no reply had been received, the union filed a representation petition with the National Labor Relations Board.

On March 18, 1952, pursuant to a stipulation between the union and respondent, a consent election was held, with the result that 75 votes were cast against the union, 63 for the union, and one vote was challenged. Thereafter, on objections filed by the union to the election, the Regional Director filed his report on such objections and recommended that a hearing be held thereon at the same time as a hearing on a complaint, filed as a result of charges by the union that respondent had been guilty of unfair labor practices, subsequent to the union's notification to it that a majority of the employees had designated it as their collective bargaining agent, and prior to the date of the election. The Board found that the election was not an expression of the employees' free choice and did not represent their uncoerced wishes as to collective bargaining representation, and that respondent had been guilty of the unfair labor practices heretofore mentioned.

It is submitted by respondent that genuine doubt, or doubt in good faith, on the part of an employer that a union represents the majority of the employees justifies refusal of bargaining with such a union until its majority representation is demonstrated, and that the Board has followed such a principle in the past. That principle, however, is irrelevant in this case as there is no evidence of any such doubt on the part of respondent. On January 29, 1952, the union informed respondent that a majority of its employees had designated it as their bargaining agent and that the union desired the respondent to recognize it and negotiate with it; the union stated that if respondent failed to comply with its request for recognition for bargaining, it would regard such conduct as a violation of the Act; and it requested an immediate reply to the bargaining request. Respondent never acknowledged the letter or any of the requests of the union. After waiting one week, the union filed a representation petition with the Board. At no time did respondent ask to see any proof that the union was designated as bargaining agent by a majority of the employees; nor was there any evidence that as of January 29, 1952, respondent disbelieved that the union had been designated by the majority of the employees. The most that respondent has to say in defense or explanation of its failure to answer the union's request for recognition and to enter into collective bargaining, as set forth in the union's letter of January 29, is that the union's letter came as a complete surprise to respondent; that it was written by the International Representative of the union who was a stranger to respondent; that great secrecy surrounded the union's organizational campaign; that the union cards were signed, for the most part, between January 14 and January 19, 1952, a considerable time before the union announced its majority status; that the card signers testified, without exception, that they signed secretively and without respond-

ent's knowledge; and that the union did not come out into the open until its letter of January 29.

None of these considerations justifies a refusal to reply to the union's notification of its bargaining status or a refusal to recognize it, bargain with it, or, at least, to inquire as to the proof of its designation as bargaining agent for the majority of the employees. Before the representation election was agreed to be held, a new general manager had been appointed, on February 22, and in reply to a letter from the union dated March 11, again demanding recognition as the employees' bargaining agent and stating that 115 employees had signed cards designating it as their representative, the general manager stated that respondent would wait until the employees had the chance of voting for their bargaining agent in a secret election. At the time he wrote the letter, the general manager had learned, during the course of a friendly, somewhat confidential personal conversation with one of the employees he had known for some years, that the employee in question was the treasurer for the union, and had collected and had on hand at that time money representing the aggregate dues for 115 of respondent's employees. On the hearing, in answer to a question as to whether there was any doubt in his mind at the time he wrote the letter that the union represented a majority of respondent's employees, the general manager replied: "In the absence of any evidence, the doubt was not in my mind, it wasn't a matter of doubt." Respondent contends that it was incumbent upon the union to demonstrate to respondent that it was the choice of the majority of the employees, as bargaining agent.

The Board found that on January 29, 1952, 93 out of 144 employees had designated the union as their bargaining agent in a unit appropriate for collective bargaining; and this finding is sustained by substantial evidence on the record as a whole. The filing of the representation petition

did not excuse the respondent from complying with the union's request after February 5. *National Labor Relations Board* v. *Inter-City Advertising Co.*, 190 F. (2d) 420, 421 (C. A. 4); *National Labor Relations Board* v. *Model Hill Co., Inc.*, 210 F. (2d) 829 (C. A. 6). The evidence likewise sustained the Board's finding that respondent was guilty of a violation of the Act in refusing to bargain with the union as the representative of respondent's employees. *National Labor Relations Board* v. *Model Mill Co., Inc., supra; National Labor Relations Board* v. *Drummond*, 210 F. (2d) 828 (C. A. 6); *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. (2d) 732 (C. A. D. C.). Counsel for respondent ably and persuasively discuss other cases from federal courts seemingly *contra* to the adjudications above referred to, but we are agreed in following the conclusions heretofore set forth. It may also be said that even though an employer be in doubt as to a union's authority, such doubt does not excuse it where it is plain that its position was not based upon any doubt but upon its unwillingness to treat with the representative of its employees. *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756 (C. A. 2). As hereafter appears, it is plain that in this case, respondent's failure to treat with the union was not because of its doubts of the union's authority to represent the employees, but because of its unwillingness and opposition to the union in question. When the refusal of an employer to bargain is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain, and it is clear that such was the reason for respondent's refusal to bargain with the union in this case.

The Board found that respondent, instead of acknowledging the letter of the union advising that it had been designated bargaining agent for the majority of the employees,

immediately declared its opposition to the union to its employees, and embarked upon a course of conduct which revealed that it was really concerned with undermining the union's strength and breaking down its claimed majority, and the evidence sustains this finding. An order which would fail to guarantee to the union restoration of the status which it would have enjoyed, except for an employer's conduct in wrongfully refusing to bargain, would allow such party to profit by its own wrong. Accordingly, the petition for an order requiring the employer to bargain, upon request, with the union which represented a majority prior to the commencement of the unfair labor practice that tended to destroy the union's majority, will be granted.

We come, then, to the other alleged unfair labor practices committed by respondent. One of the circumstances concerning which respondent and petitioner devote a large part of their briefs is concerned with a letter sent out by respondent and contended by petitioner to be a false statement of the facts, and unwarranted and prejudicial to the union, and, on the other hand, claimed by respondent to be entirely justified by the facts. It appears that on February 29, 1952, the new general manager wrote every employee, setting forth the amount of back pay to which each would be entitled according to the petition previously filed by respondent with the Wage Stabilization Board. The general manager stated therein that he had already told many of the employees that the Board election would hold up action on the petition; that only a few days before, he had received word that approval had been granted by the Wage Stabilization Board to increase wages in six jobs "which had been out of line by five cents an hour;" and that he had asked respondent's lawyers whether respondent could legally pay this increase. He continued:

> "So you will understand this situation and have all the facts, I am attaching a copy of our attorney's letter as well as the letter from the Wage Stabilization Board.

"I hope you will read both of them carefully. If you do, you will see that we are not permitted to make this payment because of the CIO election. If a new bargaining agent is voted in by the election, any wage increase finally agreed upon in a new contract could only start then and not September 7, 1951.

"This worries me a lot because you have been told differently by outside sources who do not understand our situation. You have all been so friendly and helpful to me that I do not want to see you lose your back pay because of bad advice."

In the copy of the letter from respondent's legal counsel which the general manager enclosed in his letter to the employees, counsel advised respondent that because of the pending election, the company should not make payment of any wage increases theretofore requested, and, furthermore, if the CIO should win the election, there would be limits on retroactive pay set by the Wage Stabilization Board which would be applicable to any bargaining that might follow; that the increase could be retroactive to either the beginning of negotiations or the date on which the union was certified, but no earlier; and that this situation required counsel to advise respondent to withhold any wage increases at that time.[1]

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[1] Counsel's letter to the company, dated February 29, 1952, is as follows:

"Gentlemen:

"In reply to your letter of February 28, 1952, we must advise that you cannot at this time make payment of any wage increases as requested by the Company in September 1951 of the Wage Stabilization Board.

"On February 28, 1952, the Company received from the Wage Stabilization Board a letter in which approval is given for 5c adjustments in hourly rates of a limited number of job classifications. However, this approval was conditioned as follows:

'. . . this approval has no force and effect in the event the facts are not as represented in your application.'

"When the Company filed its application for wage increases in September 1951, the Company reported to the Wage Stabilization Board that there was no claim for representation pending before the National Labor Relations Board and there was no election pending as the result of any action of the National Labor Relations Board.

"On February 5, 1952, the UAW-CIO filed a petition with the National Labor Relations Board claiming to represent your employees. By such filing,

There appears to be no question that the advice of counsel was given in good faith. In fact, his good faith is virtually conceded by petitioner, and, in our opinion, rightly so; and the letter from the general manager to the employees could not be said to misinterpret the legal advice which respondent had received. Was, then, the general manager's assertion that the employees would lose their back pay if the union won—based on the letter of respondent's legal counsel—a "calculated scheme to induce employees to vote against the Union by holding out to them the immediate loss of economic benefits if they did not do so," as found by the Board? This is a difficult question, although, of course, we assume, as we are required to, that the facts are for the Board, and that its findings are conclusive if sustained by substantial evidence on the record as a whole. A careful examination of the evidence does not show support, however, for the contention of petitioner that the general manager's own testimony "shows

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the CIO union changed the facts so that the statement which the Company gave to the Wage Stabilization Board, namely, that no representation petition is pending, is no longer true.

"The CIO union in pursuing its case before the National Labor Relations Board had an election set for March 18. As a result, Resolution 42 of the Wage Stabilization Board must be considered. This reads:

> 'On any application for an adjustment in wages, salaries or other compensation in which the National Labor Relations Board or similar state agency has ordered or scheduled a representation election, the WSB will defer action while such election is pending.'

"Because of the action taken by the CIO in filing its petition with the National Labor Relations Board and in having an election set, the facts upon which approval was given in the Company's application have been changed and therefore the statement in the letter of the Wage Stabilization Board 'that the approval has no force and effect in the event the facts are not as represented in (the) application' would be controlling.

"Therefore, as attorneys for the Company, we must advise that because of the pending CIO election, the Company should not make payment of any wage increases as heretofore requested by the company.

"Furthermore, should the CIO win the election, the following limits on retroactive pay set by the Wage Stabilization Board would be applicable with reference to any bargaining which might follow:

> 'Where a first contract is being negotiated, the increase can be retroactive to either (1) the beginning of negotiations or (2) the date the union was certified, but no earlier' (W. S. B. Interpretation Bulletin on Regulation No. 6).

"This last situation also requires us to advise you to withhold any wage increases at this time."

that he himself believed at all times that if the UAW won the election the employees could receive back pay retroactive to September 4, 1951, if the UAW consented thereto." No one knew what the Wage Stabilization Board would decide. It was frequently difficult to secure its assent to an increase of wages; and often its decisions applicable to industry in general doubtless must have seemed to result in hardship in individual cases. It is true that prior to receiving the legal advice from the respondent's counsel, the general manager asserted to one of the employees that the company would regard the question of a retroactive wage increase as a bargaining issue if the union won, but that respondent would not put pressure on the Wage Stabilization Board to have such back pay approved and paid immediately, if the union did not win; and he further stated his personal view to be that it was a question for bargaining, but that he did not assume to give that view as a legal opinion. But the general manager's later reliance upon the advice of respondent's legal counsel certainly would not indicate a belief on his part that the employees would receive back pay retroactive to September 4, 1951, if the union consented thereto. For counsel's advice was directly contrary to such a conclusion.

In this regard, another matter is argued strenuously by both sides. It appears that in the battle of campaign pamphlets prior to the election, the union accused respondent of attempting to use the matter of the increase in wages for the purpose of bribing the employees to vote against the union and urged the company to pay the increase. On March 6, 1952, the union, having already discussed the matter generally with the Wage Stabilization Board at Washington, D. C., received a letter from the executive director of that agency stating that its policy did not "prevent the putting into effect of an increase approved by the Board even though a union election is

scheduled subsequent to the date of approval." On March 11, 1952, the union forwarded a copy of this letter, together with a letter of its own, to respondent, in which it charged respondent with misrepresenting the facts and misleading the employees by its letter of February 29, and demanded that respondent mail a letter of retraction to each employee, and also make payment of the authorized retroactive pay. On March 13, 1952, respondent replied to the union's letter and charged the union with misrepresentation to the Wage Stabilization Board, and also declared that the letter from the executive director was not in response to a request for a ruling in its particular case.

The union's letter to the Wage Stabilization Board did not, as respondent pointed out, request advice as to what would be the effect of the approval by the Board of a wage increase where an election date had been established *before* such approval of the increase, as was the case in the present controversy. On the other hand, it requested information as to the effect of such an approval where the election date had been established after the approval had been granted; and the letter to the union from the executive director of the Board related only to a case where an election date was scheduled after the approval of the increase had been granted. If an election is agreed upon before approval of a wage increase, and such wage increase is actually paid before the election, it ordinarily results in disadvantage to a union seeking election as a bargaining agent, and, by the same token, in advantage to an employer who opposes such union.

The Trial Examiner found—and his finding was adopted by the Board—that counsel for respondent was clearly in error in his letter of advice "expressing an opinion that WSB regulations would preclude, in the event of union certification, further processing—even with the cooperation of the Union—of the Company's previously filed petition

for retroactive wage adjustments, and foreclose as a matter of law retroactively back of the certification date." There is nothing before us from which it can be ascertained that counsel was in error in his opinion. In the report of the Trial Examiner, adopted by the Board, the regulations in question are referred to and quoted, but like many such regulations, they are complicated and obscure and, in themselves, do not disclose that counsel was mistaken in his opinion; the official interpretation of the regulation referred to in counsel's letter to respondent, in fact, supports the statements in respondent's letter to its employees; and respondent's counsel, in their brief and argument here, strenuously urge that the legal opinion in question was correct and accurately stated the policy of the Wage Stabilization Board. We do not know whether the legal opinion was right or wrong; and there is nothing in the record, regulations, or law cited to us from which the question can be resolved. In such an obscure situation, all that can be said, on this aspect of the case, is that there is no evidence to sustain findings of unfair labor practices based on the counsel's legal opinion which was submitted by respondent to its employees, or based on its letter accompanying such opinion.

The Board found that threats had been made, just before the election, by a supervisory employee, that respondent would sooner or later find out which employees were signing affidavits with respect to claimed unfair labor practices on the part of respondent and would automatically fire any employees who furnished such statements in support of the alleged unfair labor charges. These threats were alleged to have been made at the time when the International officer was contemplating filing charges of unfair labor practices against respondent. A fair reading of the record discloses that this isolated so-called threat, if made at all, was made, just before the election, as an angry

retort to what the supervisory employee must have considered a taunt in the course of an argument in which an employee told the supervisor that "if we didn't win this election there would be charges filed before the ballot is counted." No charges of unfair labor practices had at that time been made, and the supervisory employee, hearing of the challenge for the first time, obviously could not have spoken with the company's authority in the matter; and the employee must have known this. Such an isolated instance is magnified, when looked at alone. The incident can only be reasonably considered as an instance of hotheadedness in a dispute between two individuals.

It appears that much of the activity of the respondent in the election campaign was directed to telling employees how much better a certain independent union would be than the union here in question and that such conduct resulted in a number of employees withdrawing from the original union; and it is contended that the action of respondent thereby resulted in disadvantage to the union by contributing to its loss of the election. In this regard, it also appears that, in answer to a question from an employee as to how long employees would have to wait for another election and another opportunity to choose a bargaining representative in the event the union lost the election, the general manager replied that they would have to wait a year. This was true. However, the general manager added that if the independent union could demonstrate that it had a majority, it could be recognized without an election and without the employees' being required to wait a year. This was also true; but having failed to recognize the original union in the case, as we have held that it should, respondent was already guilty of the unfair labor practice of refusal to bargain. There is, however, no evidence to show that then, or at any time since, the employees desired to have the independent union represent

them, or that it ever demonstrated or claimed that it represented a majority of the employees; and there is no evidence to show that the respondent has ever recognized the independent union as the bargaining agent of the employees, or that the independent union had sought such recognition. Consequently, that portion of the order that directs respondent to refrain from recognizing the independent union is not justified and such portion of the order, as well as the notice directed to be posted which is based thereon, will have to be stricken.

There is no evidence to support the finding that respondent was responsible for any pressure or coercion exerted upon the employees in their selection of a bargaining agent by third parties. If such third parties were guilty of trying to coerce the employees, there is no proof that respondent was guilty of assisting in any such coercion. Petitioner's most serious claim in this regard is that one of these third parties had implied that the company would close and leave the town if the union won the election. The general manager of respondent, however, prior to this alleged statement, had clearly stated to the employees, in answer to a question on this very point, and, apparently, to clear up unfounded rumors, that the company would not close its plant if the union won. An implication in the statement of the third party, contrary to the management's stand on this point, certainly could not be said to have influenced the employees who were carrying on a constant discussion with the officers and supervisors. The fact that meetings were held between such third parties and respondent is not evidence nor does it give rise to reasonable inferences that respondent was assisting in attempts to coerce or influence its employees. Respondent had the right to express its opinions on the controversy and to cooperate with third parties who had been responsible for bringing the company to the town, in advancing arguments

against the union, as long as no intimidation or coercion was indulged in, or benefits promised or threats made, express or implied.

We next consider whether there were offers of benefits and threats of reprisals made to employees by respondent with the object of defeating the union in the representation election. Immediately after receiving the union's letter stating that it represented the majority of the employees, the general manager then in charge, Mr. Senter, told the shop committee, which was at that time in existence as the representative of respondent's employees, that if the union became the bargaining representative, respondent's plant would in all probability be locked up, and moved out of the town; that the petition to increase wages would "go out"; that the employees would lose their back pay; and that there would be no more overtime pay. The members of the shop committee, which was considered a conduit for information from management to the employees, afterward repeated what the general manager had told them to a meeting of respondent's employees. The evidence also disclosed that when two out of three members of the shop committee, who had joined the union, posted their resignations from the shop committee on the bulletin board on the ground that they were no longer really representing the employees, the general manager called them into his office, told them that they had acted in an underhanded manner, and that he thought he knew what side they were on. He later told another employee that the union was going to cause the men in the shop to lose more than $100 each—obviously a reference to a retroactive allowance of increase in pay for which the respondent had petitioned the Wage Stabilization Board.

Because of our conclusions with respect to the above mentioned letter of respondent's legal counsel and the letter of respondent to its employees, we are of the view

that no unfair labor practices resulted from respondent's statement that if the union came in, the employees would lose their back pay. For the "back pay" in question meant the increase for which respondent had filed the petition; and what was meant by everyone in references to back pay was the increase in wages which it was hoped would be allowed by the Wage Stabilization Board, to take effect retroactively. The foregoing statement, together with the statement that the petition would be shelved if the union won, did not constitute unfair labor practices in the light of counsel's letter and a fair reading of the official interpretation of the regulations of the Wage Stabilization Board, as quoted therein. For Senter's statement that the petition for increase of wages would have to be shelved, if the union won, is reasonably to be interpreted to the effect that the Wage Stabilization Board would not act upon the petition during a labor dispute, and that if the union won, it would have to draw up a new petition in accordance with the regulations of that Board.

As to Senter's interrogation of employee Gill, Foreman Johnson's questioning of employees Hensley, Johnson, Sollars, and Stauffer, and Foreman Jardine's like questioning of employees Fryant and Rhonemus, the Trial Examiner, in his report, stated that except for Senter's questioning of Gill, he did not regard the interrogations as too consequential and gave them little weight in his appraisal of the more basic issues in the case, but that "under well established Board precedents they are found to constitute illegal interferences with employee rights." We find nothing, however, in the interrogations that justifies the conclusion that they had the purpose or effect of intimidating or coercing the employees or interfering with their rights of free organization. They consisted of no promises of benefits or threats of reprisal. The statements made were merely arguments and understood to be such

by the employees. Respondent opposed the union most strenuously in its arguments; but the statements made did not consist of threats of what the company would do if the union were selected by the employees but what, in its opinion, the union would do, and what the results might be, in the light of the experience with the union in question, on the part of respondent and its employees at another plant. Throughout the examination of the entire record, we have been assiduous to discover promises, threats, intimidation, or coercion; and these, we have not found. Instead, there was a continuous argument, day after day, back and forth, between the employees and the general manager, and between the foremen and the employees covering every phase which has been presented to us. Bulletins and pamphlets issued by both sides argued and answered all the propositions that have been argued in this case. During the course of the hearing, the Trial Examiner remarked that one witness had stated that, as they approached the election, the employees spent 75% of their time talking and 25% of their time working. An employee, who was on the stand as a witness for the Board at the time the Trial Examiner made the statement, replied: "I don't think there was that much work done." In no labor case that has come before us does there seem to have been as much unrestrained talk on the part of everyone, as well as absence of any fear of the consequences of expressing their opinion, on the part of the employees. In the light of this complete freedom of discussion and indulgence in argument for and against the union on the part of all of the employees as well as the supervisors and officials—to the abandonment of most of the work of the company—it is impossible to conclude that Senter's statement a month and a half before the election that he did not want the plant used as an election hall contributed to the defeat of the union. The plant seems to have been used by everyone

—employees, supervisors, and officials alike—as an election hall; and it is a most notable fact that in spite of all of this discussion and argument, no employee ever felt he was being discriminated against or that he would suffer any disadvantage or discrimination because of his views as to the union or his expression or argument as to those views; and no one ever did.

It is to be remembered, in considering whether Senter's statements constituted threats that influenced the employees in their rights of free organization, that they were made shortly after he was notified, to his surprise and disbelief, of the union's majority, and that several weeks before the election, a new general manager was appointed in his place; that the new manager, in contradiction to Senter's statement that the company would probably close if the union came in, stated to the employees that, on the contrary, the company would not close if the union came in. As to the statement alleged to have been made by Senter to employee Berry that there would be no more overtime if the union won the election, Berry, on cross-examination, testified that there was no indication from the company that overtime would not be continued; and this statement was never repeated by Senter, nor ever voiced by the new general manager who replaced him, during practically all of the period in which the employees were engaged in the union controversy.

Many of the conversations about the union and the independent union were started by the union employees themselves, and many of the questions with regard to various phases of the entire controversy were first asked of officials and supervisors by those employees.

The Trial Examiner, in the light of the foregoing facts, felt called upon, in his able and comprehensive report to the Board, to declare that respondent was not "absolved from liability, because the record shows that many plant

employees, including some of those questioned openly professed their union sympathy without apparent fear of such disclosure." This was based on the ground that any questioning of employees on union matters is inherently coercive since it implies a threat of possible future employer reprisals, and, therefore, limits employees in their right of self-organization.

An employer's interrogation of employees must be judged in the light of the totality of the conduct of the employer. The coercive effect of the language used should be determined by the entire factual context in which it is spoken. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469. Considering the record as a whole, we are of the opinion that the evidence does not sustain findings that respondent, in its statements to its employees, coerced, restrained, or interfered with them in their right of self-organization, or that, in its relations with its employees, it was guilty of an expression of any views containing a threat of reprisal or promise of benefit.

During the several weeks before the election, the employees argued with and directly contradicted not only the supervisory employees but the officials of the company, without any fear of discrimination or disfavor; and both sides maintained their views as to the merits or demerits of the union with the same freedom and to the same extent as they have in the arguments of counsel in the case before us. If there were any evidence that the statements made by respondent's officials or supervisory employees expressly or implicitly coerced, intimidated, interfered with, threatened, or promised benefits to the employees, we would be bound to hold that such statements constituted unfair labor practices; but there is no evidence to support such conclusions.

As to respondent's contention that under the most recent decision of the Board [2] holding that a labor organization

[2] *Aiello Dairy Farms*, 3-CA-637.

that has lost an election cannot establish its representative status by proceedings based upon unfair labor practices of which it had knowledge prior to the election, it is the rule that a change in the policy of the Board does not require its application to the disposition of cases theretofore decided by it and cannot be availed of by a respondent against whom an order has been entered prior to the adoption of such policy. *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 5). See also *Brooks* v. *National Labor Relations Board*, 348 U. S. 96, 104, n. 16.

In accordance with the foregoing, an order will be entered enforcing paragraphs 1(a) and 2(a) of the Board's order which require respondent to cease and desist from refusing to bargain collectively, and directing it, upon request, to bargain with the union; paragraph 2(b) providing for the posting of copies of notice will be enforced subject, however, to the limitation that such notice will be confined in scope to the aforementioned paragraphs 1(a) and 2(a); paragraph 2(c) providing for notification to the Regional Director will also be enforced; and the petition for enforcement as to the other provisions of the order is denied.

JUDGMENT

(Filed February 18, 1955)

On Petition for Enforcement of an order of the National Labor Relations Board.

This cause came on to be heard on the transcript of record from the National Labor Relations Board and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that paragraphs 1(a) and 2(a) of the Board's order which require respondent to cease and desist from refusing to bargain collectively, and directing

it, upon request, to bargain with the union, be enforced; that paragraph 2(b) providing for the posting of copies of notice be enforced, subject, however, to the limitation that such notice will be confined in scope to the aforementioned paragraphs 1(a) and 2(a); that paragraph 2(c) providing for notification to the Regional Director be enforced; and that the petition for enforcement as to the other provisions of the order be and is hereby denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 237

ARMCO DRAINAGE & METAL PRODUCTS, INC., FABRICATING DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 5a-23a)[1] is reported at 220 F. 2d 573. The findings of fact, conclusions of law, and order of the Board (B.A. 317a-391a) are reported at 106 NLRB 725.

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[1] The symbol "Pet." refers to the petition for certiorari, and the symbol "B.A." to the Board's appendix.

JURISDICTION

The judgment of the court below (Pet. 23a) was entered on February 18, 1955. Petitioner's application for rehearing was denied on April 20, 1955. The petition for a writ of certiorari was filed on July 14, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer who rejects a union's demand for recognition and insists upon a Board-conducted election is guilty of an unlawful refusal to bargain where the evidence establishes that the union at the time of the demand for recognition represented a majority of the employees in an appropriate unit, that the employer entertained no doubt as to the union's majority status, and that the employer's withholding of recognition was for the purpose of gaining time within which to dissipate the union's majority status.[2]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 17-19.

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[2] Petitioner's Question III (Pet. 3) is not presented, being based on petitioner's mistaken view that the decision of the court below is irreconcilable with the Board's findings. See *infra*, pp. 11-13.

STATEMENT

A. The Board's Findings of Fact

In the latter part of 1951, petitioner's employees became dissatisfied with their wages, which petitioner was unable to increase without approval from the Wage Stabilization Board, herein called WSB (B.A. 325a-326a; 7a, 219a-220a, 305-306a, 312a, 445a-449a). In September 1951 petitioner sought WSB's permission to grant a wage increase effective as of that date (B.A. 326a; 312a, 445a-449a). Considerable time elapsed without action on this request and an organizational campaign among petitioner's employees gained momentum (B.A. 327a; 12a-14a, 245a, 307a). By January 29, 1952, 93 of petitioner's 144 production and maintenance employees in an appropriate unit signed cards designating the Union (International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO) as their bargaining representative, and on that date the Union advised petitioner by letter of its majority status and requested petitioner to recognize and bargain with it (B.A. 327a-328a; 14a-15a, 416a-417a). Although the letter asked for an immediate reply, petitioner never acknowledged it (B.A. 328a; 15a). When by February 5 no reply had been received, the Union filed a representation petition with the Board (B.A. 328a; 11a, 392a-393a).

Thereafter a regional officer of the Board scheduled a joint conference between petitioner and the Union which was held on February 26 (B.A. 8a-9a, 22a-23a). At the conference, the parties agreed

to hold an election on March 18 to determine the bargaining desires of the employees (B.A. 317a; 11a, 23a, 394a-397a). At about the same time this agreement was executed, however, Hutton, petitioner's then general manager, learned from one of the employees that 115 employees, or more than two-thirds of the bargaining unit, had signed Union cards and had paid dues to him as the Union treasurer (B.A. 103a, 271a-272a, 286a). Notwithstanding that, as Hutton himself subsequently testified (B.A. 290a), the Union's majority status "wasn't a matter of doubt," petitioner continued to reject the Union's claim for recognition and persisted in its position that it would not recognize the Union unless and until it won the election (B.A. 342a, n. 19; 19a, 426a). Moreover, during the entire period from the date of the Union's first demand for recognition to the date of the election, petitioner engaged, as we show below, in various activities to dissipate the Union's strength.

Thus, petitioner repeatedly emphasized to the employees during the preelection period that in the event of favorable WSB action on its application for a wage increase, petitioner would pay the increase retroactively to the date of the application if the Union lost the election; but that prevailing regulations precluded such retroactive pay if the Union won (B.A. 329a, 332a, 335a-339a, 341a; 17a, 32a-33a, 39a-40a, 46a-47a, 88a, 102a-103a, 187a-188a, 194a-195a, 215a-216a, 281a-286a, 294a-296a, 298a-300a, 417a-421a). Soon after the Union's first demand for recognition, General Manager

Senter (later replaced by Hutton) told employees that if the Union prevailed, overtime work would be eliminated, plant expansion stopped, and the plant probably closed (B.A. 329a-330a; 33a-36a, 43a, 88a). Similarly, Foreman Duval, on learning that the Union intended to file unfair labor practice charges with the Board, told an employee that anyone who furnished affidavits in support of the Union's claims would be discharged (B.A. 343a; 21a, 203a, 207a). During the preelection campaign also, petitioner's foremen questioned various employees regarding their union views (B.A. 332a-334a, 367a; 71a-73a, 97a, 105a, 185a-188a, 194a-196a, 201a, 214a-215a, 223a).

In addition to itself engaging in the foregoing conduct, petitioner cooperated with and furnished a list of its employees to a group of local businessmen who wanted petitioner's plant to remain in the community and to expand (B.A. 359a; 11a, 241a-242a, 245a-248a, 251a-254a). These businessmen undertook to discuss the Union situation with certain of the employees, told the employees that petitioner would move the plant out if the Union campaign succeeded, and suggested that the employees join an independent union which had just started to solicit support among the employees at petitioner's plant (B.A. 359a-362a; 62a-63a, 73a-77a, 105a-106a, 247a, 249a, 258a-259a).

The independent union which was seeking adherents among petitioner's employees was the Armco Employees' Independent Federation, Inc., a labor organization which had for a number of

years represented the employees at petitioner's main plant in Middletown, Ohio (B.A. 364a; 10a). Before the advent of the Union, the Independent had shown no interest in organizing the employees at the plant here involved (B.A. 463a; 110a, 104a). However, in March, one month after the Union filed its petition for certification, the Independent began an organizing campaign (B.A. 364a-365a; 61a, 192a). Contrary to its attitude of opposition toward the Union, petitioner plainly manifested its approval of the Independent's efforts. Even before the latter's campaign began, petitioner told the employees that it would recognize an independent union on the basis of a card check although it was insisting upon an election in the case of the Union (B.A. 366a-367a; 102a, 273a-274a). Thereafter, petitioner repeatedly stressed to the employees the concrete benefits they would derive from representation by the Independent as opposed to representation by the Union, facilitated and aided the Independent's organizational efforts, and gave Independent adherents free run of plant property for organizing purposes although it had previously announced a rule forbidding Union adherents from engaging in such conduct (B.A. 330a, 336a, 365a-367a, 370a-372a; 33a, 44a, 49a-50a, 52a, 56a-62a, 87a, 90a-91a, 95a-97a, 101a-102a, 104a, 110a, 121a-122a, 205a-206a, 215a-216a, 221a-223a, 225a-227a, 274a-275a, 279a-280a, 428a).

Against this background, the election took place as scheduled on March 18 and the Union lost by a vote of 63 to 75 (B.A. 318a, 11a, 397a).

B. The Board's Conclusions of Law and Order

Upon the foregoing facts, the Board found (B.A. 376a-380a) that the Union on January 29, 1952, represented a majority of petitioner's employees in an appropriate unit and that petitioner's refusal to recognize and bargain with the Union at that time pursuant to the latter's request constituted a violation of Section 8(a)(5) and (1) of the Act. Recognizing the well-settled principle that an employer who entertains a good faith doubt of a union's asserted majority may challenge that majority and require proof by an election or other suitable method, the Board concluded upon reviewing petitioner's entire course of conduct that petitioner did not entertain a good faith doubt of the Union's majority but challenged it merely to gain time within which to undercut the Union's support and undermine the Union's majority (B.A. 377a-379a.) The Board noted also that under these circumstances the fact that the Union was willing after its bargaining demand to file a representation petition and enter into a consent election agreement did not preclude a finding of an earlier refusal to bargain or a remedial order based thereon (B.A. 379a). The Board concluded that the election which the Union subsequently lost became, by virtue of petitioner's antecedent conduct, a nullity and did not exonerate petitioner from its statutory obligation to respond to the Union's earlier bargaining demand at a time when its majority was not in question (*ibid.*).

The Board found, in addition, that petitioner's conduct during the period between the Union's January 29 bargaining demand and the date of the election, including its statements concerning retroactive payment of the WSB increase, its statements concerning the effect of unionization upon plant operations, its interrogation of employees concerning union activities, and its activities with respect to the Citizens' Committee and with respect to the Independent, constituted independent violations of Section 8(a)(1) and (2) of the Act (B.A. 329a-376a).

Accordingly, the Board ordered petitioner to cease and desist from engaging in the unfair labor practices found. Affirmatively, the Board directed petitioner to bargain with the Union upon request and to post appropriate notices (B.A. 389a-391a).

C. The Decision of the Court Below

The court below, upon its review of the record, agreed with the Board that petitioner's refusal to recognize and bargain with the Union pursuant to the latter's request of January 29 violated Section 8(a)(5) and (1) of the Act. With respect to petitioner's contention that an employer's good faith doubt of a union's majority status justifies a refusal to bargain until that majority is demonstrated, the court below concluded that the cited principle was irrelevant in the case at bar inasmuch as there was no evidence of any such doubt on the part of petitioner (Pet. App. 7a). The court below then declared (Pet. App. 9a-10a):

> * * * it is plain that in this case [petitioner's], failure to treat with the union was not because of its doubts as to the union's authority to represent the employees, but because of its unwillingness and opposition to the union in question. When the refusal of an employer to bargain is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain, and it is clear that such was the reason for [petitioner's] refusal to bargain with the union in this case.
>
> The Board found that [petitioner], instead of acknowledging the letter of the union advising that it had been designated bargaining agent for the majority of the employees, immediately declared its opposition to the union to the employees, and embarked upon a course of conduct which revealed that it was really concerned with undermining the union's strength and breaking down its claimed majority, and the evidence sustains this finding.

Accordingly, the court below enforced the Board's bargaining order (Pet. App. 10a).

Although in agreement with the Board that petitioner's course of conduct "revealed that it was really concerned with undermining the union's strength and breaking down its claimed majority," the court below, upon consideration of the record (Pet. App. 10a-22a), disagreed with the Board's

findings that that conduct was independently violative of Section 8(a)(1) and (2) of the Act. Enforcement was denied therefore of the portions of the Board's order predicated on such findings (Pet. App. 23a).[3]

ARGUMENT

While we believe that the court below should have sustained the Board's order in its entirety, it is clear that its action in upholding and enforcing part of the order presents no question warranting review by this Court.

1. Undisputed evidence establishes that the Union at the time of its January 29 request for recognition and collective bargaining represented a majority of petitioner's employees in an appropriate unit. It is likewise undisputed—indeed, petitioner concedes (Pet. 14)—that certification is not a prerequisite to recognition of a union that

[3] The court below rejected petitioner's contention, not urged here, that the Board's bargaining order in the instant case was invalidated by its later decision in *Aiello Dairy Farms*, 110 NLRB No. 205. In the *Aiello* case, the Board asserted that it would not permit a union which had lost an election to establish its representative status by proceedings based upon unfair labor practices of which it had knowledge prior to the election. The court below affirmed the Board view that a change in the policy of the Board, such as that in *Aiello*, does not require its application to the disposition of cases theretofore decided by it and cannot be challenged by a party against whom an order had been entered prior to the adoption of such policy (Pet. App. 23a). See, in addition to the cases cited by the court below, *National Labor Relations Board* v. *Dixie Terminal Co.*, 347 U.S. 1015, in which this Court denied a petition for certiorari predicated on a virtually identical ground.

has a clear majority. *Brooks* v. *National Labor Relations Board*, 348 U. S. 96, 101. Hence, the only issue presented to the Board and the court below in this regard was whether petitioner in ignoring the January 29 request and in declining to recognize the Union until its majority was established in a Board election was guilty of an unlawful refusal to bargain within the meaning of Section 8(a)(5) and (1) of the Act. On this issue, the Board and the court below were in agreement. Recognizing the settled principle that an employer who entertains a good faith doubt of a union's asserted majority may with impunity decline to grant recognition and insist that that majority be demonstrated in a Board election, the Board and the court below concluded on the basis of the evidence in the record that petitioner did not entertain a good faith doubt as to the Union's majority, but declined recognition and insisted upon a Board election merely for the purpose of gaining time within which to undermine the Union's strength and dissipate its majority status. Accordingly, the Board and the court below agreed that petitioner had violated Section 8(a)(5) and (1) of the Act.

The validity of the principle thus applied is firmly established. Petitioner concedes its propriety (Pet. 24) and the cases it cites (Pet. 12-13) uniformly so hold.

2. Petitioner asserts, however (Pet. 7-8, 25-29), that the Board's finding of an unlawful refusal to bargain pursuant to the Union's January 29 request was based solely on its subsidiary finding that

petitioner's subsequent anti-union campaign violated other unfair labor practice provisions of the Act. It follows, petitioner argues, that the court below, having rejected this subsidiary finding, was without authority to affirm the Board's conclusionary holding of a wrongful refusal to bargain. This argument overlooks, however, the Board's basic holding, affirmed by the court below, that petitioner's "real reason for failing to reply to the Union's bargaining request of January 29, 1952, was to gain time within which to undermine the Union's support" (B.A. 379a). The Board thus stated its view of the law (B.A. 377a):

> * * * a challenge to a majority does not shield an employer if it is primarily motivated not by a genuine doubt as to the existence of the majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to seek to undercut the union's support. * * * an employer may not insist upon [an election] as the only method [of establishing a majority] where his purpose is to dissipate rather than to reflect union support, and particularly so where he has by his own unfair labor practices made it impossible for an election to mirror the employees' free, uncoerced, and untrammeled wishes.

To construe this language, as petitioner does, as a holding that a finding of other unfair labor practices is a prerequisite to a finding of an illegally-motivated refusal to bargain is to misread the text.

While the existence of other unfair labor practices has been considered by the Board as a highly relevant circumstance in detemining good or bad faith motivation, that determination "depends, in the final analysis, upon all the facts and circumstances of that case. There is no rule which will save the Board from the necessity of considering all the relevant evidence before making a good or bad faith determination." *Gilbert Co.*, 110 NLRB No. 231. And see *Southern Pine Electric Cooperative*, 104 NLRB 834, 835, 844-845, enforced *per curiam*, 218 F. 2d 824 (C.A. 5), petition for certiorari pending, No. 152, this Term. The decision of the court below is fully consonant with the views here expressed. Petitioner cites no contrary cases and we are aware of none.[4]

3. Petitioner suggests (Pet. 9-11, 15) that "the decision below holds that an employer who gains knowledge that a claiming union has a card majority must immediately recognize and bargain with the union without more . . ." and on this ground asserts a conflict with decisions of other courts of appeals. But the plain language of the decision below refutes this suggestion. The opinion unequivocally states (Pet. App. 9a) that "When the refusal of an employer to bargain is due to a desire to gain time and to take action to dissipate

[4] As already noted, *supra*, p. 10 n. 3, the Board in its *Aiello* decision has now administratively determined that it will not permit a union which has lost an election to establish its representative status in a proceeding based upon unfair labor practices of which it had knowledge prior to the election. Under these circumstances, the precise problem raised by the instant case is unlikely to recur.

the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain, and it is clear that such was the reason for [petitioner's] refusal to bargain in this case." Accordingly, the court below properly regarded it as "irrelevant in this case" that a good faith doubt on the part of an employer of a union's majority status justifies a refusal to bargain until that majority is demonstrated (Pet. App. 7a).

Since the court below found that petitioner's refusal to bargain was motivated by hostility to the Union (Pet. App. 9a-10a), settled authority supports its rejection of petitioner's contention (Pet. 15) that the Union's failure to offer proof of its majority status relieved petitioner of its duty to bargain, even though the slightest inquiry on its part would have revealed the Union's decisive majority. As the Court of Appeals for the Fourth Circuit stated in *National Labor Relations Board* v. *Clarksburg Publishing Co.*, 120 F. 2d 976, 980:

> Where the real attitude of an employer is that he will not bargain collectively with his employees under any conditions, he cannot excuse himself on the ground that sufficient proof of a majority status was not furnished him. *N.L.R.B.* v. *Remington Rand, Inc.*, 2 Cir., 94 F. 2d 862, certiorari denied, 304 U.S. 576, 58 S. Ct. 1046, 85 L. Ed. 1540; *N.L.R.B.* v. *Biles Coleman Lumber Co.*, 9 Cir., 98 F. 2d 18, 22[5]

[5] *National Labor Relations Board* v. *D. Gottlieb & Co.*, 208 F. 2d 682 (C.A. 7), relied on by petitioner (Pet. 9), is not to the contrary. In that case the Board had found that

4. Petitioner's final contention (Pet. 14, 15) that an employer may withhold recognition from a statutory bargaining representative during the pendency of a representation petition is vulnerable even on its own statement for, as petitioner concedes, that doctrine, even where relevant, has no application to situations where the employer has evidenced a rejection of the collective bargaining principle or has taken action to dissipate the union's majority or to prevent a free election.

---

the employer's initial refusal to bargain was unlawful because it was motivated by a "rejection of the collective-bargaining principle" (102 NLRB 1708, 1710). The court set aside this finding, noting that the employer "had no anti-union background" and had engaged in "no pattern of conduct hostile to unionism." In the instant case, the court below found solid evidentiary support for the Board finding that petitioner, upon receipt of the Union's bargaining demand, "immediately declared its opposition to the union, and embarked upon a course of conduct which revealed that it was really concerned with undermining the union's strength and breaking down its claimed majority . . ." (Pet. App. 10a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari presents no question of general importance and should be denied.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargain-

ing by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall

have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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